

Bruce H. Jackson, State Bar No. 98118
bruce.h.jackson@bakernet.com
BAKER & MCKENZIE LLP
Two Embarcadero Center, 11th Floor
San Francisco, CA 94111-3802
Telephone: +1 415 576 3000
Facsimile: +1 415 576 3099

Attorneys for Defendant
NATIONAL TOBACCO COMPANY, LP

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

RAYMOND RILEY p.k.a. Boots Riley,
SOLOMON DAVID and MARLON IRVING
p.k.a. Lifesavas,

Plaintiffs,

V

NATIONAL TOBACCO COMPANY LP.

Defendant.

Case No. C-08-01931 JSW

[PROPOSED]

**ORDER GRANTING DEFENDANT
NATIONAL TOBACCO COMPANY'S
MOTION TO DISMISS, STAY OR
TRANSFER IN FAVOR OF FIRST-
FILED ACTION IN NEW YORK; OR
IN THE ALTERNATIVE, TO DISMISS
OR TRANSFER FOR IMPROPER
VENUE UNDER F.R.C.P. 12(b)(3) and
28 U.S.C. § 1406(a); OR IN THE
ALTERNATIVE, TO TRANSFER FOR
THE CONVENIENCE OF THE
PARTIES UNDER 28 U.S.C. § 1404(a)**

Date: June 13, 2008

Time: 9:00 a.m.

Time: 9:00 a.m.
Crtrm: 2, 17th Floor

Before: The Honorable Jeffrey S. White

[FILED VIA E-FILING]

1 The motion of Defendant National Tobacco Company LP ("NTC") to dismiss, stay, or
 2 transfer in favor of first-filed action in New York; or in the alternative, to dismiss or transfer for
 3 improper venue under Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406(a) or, in the alternative, to
 4 transfer for the convenience of the parties and witnesses under 28 U.S.C. § 1404(a) came on
 5 regularly for hearing before this Court on June 13, 2008 at 9:00 a.m.

6 After considering the moving and opposition papers, arguments of counsel, and all other
 7 matters presented to the Court, IT IS HEREBY ORDERED that:

8 NTC'S motion to dismiss this action is hereby **GRANTED**.

9 1. Dismissal of this action is warranted because of the prior-filed action by NTC against
 10 Plaintiffs and others pending in the United States District Court for the Southern District of New
 11 York. The principles of federal comity permit a district court to dismiss an action when a complaint
 12 involving the same parties and issues has already been filed in another district. Pacesetter Systems,
 13 Inc. v. Medtronic, Inc., 678 F.2d 93, 95 (9th Cir. 1982). Dismissal in this case is warranted on the
 14 following grounds: NTC's action in the Southern District of New York was filed before Plaintiffs'
 15 action in the Northern District of California. It encompasses all parties and substantially all issues
 16 raised in this action and arises out of the same set of transactions and occurrences. Dismissing this
 17 action, in light of a pending action in New York that would allow comprehensive disposition of the
 18 issues in the present action, would also further judicial efficiency and the conservation of judicial
 19 resources. See Alltrade, Inc. v. Uniweld Products, Inc., 946 F.2d 622, 625 (9th Cir. 1991).

20 2. Dismissal of this action is independently warranted under Federal Rule of Civil
 21 Procedure 12(b)(3) and 28 U.S.C. § 1406(a). The Northern District of California is the improper
 22 venue for this action, as the parties are bound by a forum selection clause that mandates the
 23 adjudication of all disputes in New York. 28 U.S.C. § 1406(a) provides the grounds for dismissing
 24 an action when a plaintiff files a case in the improper venue. Forum selection clauses are *prima*
 25 *facie* valid absent a strong showing that enforcement would be unreasonable or unjust. Manetti-
 26 Farrow, Inc. v. Gucci America, Inc., 858 F.2d 509, 514-15 (9th Cir. 1988). Plaintiffs Raymond
 27 Riley, Solomon David and Marlon Irving are bound by the provisions of the Agreement between
 28 NTC and Galactic Funk Touring, Inc., as Galactic Funk Touring, Inc.'s Manager Paul Peck signed

1 the Agreement with the authority to act as their agent and on their behalf; Plaintiffs' actions in
2 permitting Mr. Peck to sign the sponsorship agreement, their performance at the show, and their
3 interactions with ZigZagLive representatives provided Mr. Peck at least apparent authority; and
4 Plaintiffs' actions are so related to the substance of the Agreement as to fall under the terms of the
5 Agreement. C.A.R. Transp. Brokerage Co. v. Darden Restaurants, Inc., 213 F.3d 474, 479 (9th Cir.
6 2000); Manetti-Farrow, Inc., 858 F.2d at 514 n5; Tolentino v. Mossman, 2007 U.S. Dist. LEXIS
7 95717, *22 (E.D. Cal. 2007).

8
9 IT IS SO ORDERED.
10

11 Date: _____
12

The Honorable Jeffrey S. White
United States District Judge

13 NYCDMS/1085714.2
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28